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Section 5

Overview

Sub-Section 5.100 - Purpose Of This Manual

Subject 5.105 - Applicability of this Manual

This manual provides procurement guidance or direction to all public community providers of mental health, mental retardation and substance abuse services that receive funds from the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services. This includes operating and administrative policy community services boards, local government departments with policy-advisory CSBs, and behavioral health authorities as defined in Sections 37.1-194.1 and 37.1-242 et seq. of the *Code of Virginia*. The term "CSB" or "Community Services Board" is used generically in this Manual to include all such public community providers.

Subject 5.110 - Procedures

This section was previously titled "Guidelines". Administrative policy CSBs that are city or county government departments, local government departments with policy advisory CSBs, or administrative policy boards that are required by their local governments to comply with the local government's procurement policies and procedures may continue to utilize this Manual as guidelines. These CSBs must comply with the VPPA and local ordinances and regulations.

Operating CSBs, administrative policy CSBs that are not local government departments or are not required to adhere to local government procurement policies and procedures, and behavioral health authorities shall be in material compliance with the requirements as set forth in this Manual. This manual enunciates the procedures for making procurement decisions that are in compliance with:

- The Virginia Public Procurement Act (VPPA) and
- Generally accepted public procurement practices.

Procurement reviews of all CSBs will be conducted periodically to determine compliance with appropriate requirements.

NOTE: Paragraphs in this Manual that contain procedures that are either required by or have references to the VPPA, are noted with the Code of Virginia Section Number in a block following the applicable paragraph. Other required procedures, as stated in this Manual, are required by the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS).

Subject 5.120 - Quick Reference

This manual provides a quick reference to questions that must be answered in making a procurement such as:

- Are these goods or services exempt from the requirement of competition?
- How can qualified vendors be located?
- Which competitive procurement method should be used?
- How are adequate specifications written?
- How is a procurement solicitation constructed?

- How should bids or proposals be evaluated?
- What about contract administration?
- What can the CSB do if a vendor does not perform?
- What are the consequences for a vendor who fails to perform?
- What remedies do vendors have in contractual disputes?
- What are the ethical questions that must be considered in procurement?

Sub-Section 5.200 - How will this manual be updated?

Subject 5.210 - Revisions

Users of this manual are encouraged to recommend revisions by:

- Contacting:

Commonwealth of Virginia
Department of Mental Health, Mental Retardation and Substance
Abuse Services
Office of Administrative Services/Contract Office
P. O. Box 1797
Richmond, Virginia 23218-1797
- Providing chapter, page and recommended change.

Subject 5.220 - Changes

Consecutively numbered update bulletins will be distributed with changes to the manual. The bulletins will:

- Give instructions for the insertion and removal of pages,
- State the purpose of the new or revised material and
- Specify any policies or procedures which have been superseded.

Sub-Section 5.300 - Organization

How is the manual organized?

Subject 5.310 - Table of Contents

Tables of contents are located:

- At the front of the Manual. This table lists the sections in numerical order.
- At the front of each section. Each Section Table of Contents lists the:
 - sub-Sections and subjects in numerical order and
 - reference page numbers within each section.

Subject 5.320 - Sections

Sections group major related activities and are numbered sequentially. To allow for future expansion, initial numbering will be by 5's, i.e., 5, 10, 15, etc.

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Subject 5.330 - Sub-Sections and Subjects

Further divisions are as follows:

- Sub-Sections divide the section into meaningful topics and are numbered in the hundreds, i.e., .100, .200, etc.
- Subjects are further divisions of Sub-Sections and are numbered by ten, i.e., .110, 120, etc. or are designated by bullets (●).

Subject 5.340 - Pages

Pages are numbered sequentially within each section by section number and page number, i.e., 10-1, 10-2, etc.

Subject 5.350 - References

References to sections of the Code of Virginia will be noted in blocks at the end of each section where applicable.

Sub-Section 5.400 - What is the Virginia Public Procurement Act (VPPA)?

Subject 5.410 - History

The VPPA was enacted into law as part of the *Code of Virginia* by the General Assembly of Virginia and became effective on January 1, 1983. It was recodified with new section numbers effective October 1, 2001. This manual references the new Code section numbers.

Subject 5.420 - Purposes

The purposes of the VPPA are to:

- Bring together all procurement laws into one place in the Code of Virginia,
- Enunciate policies pertaining to the procurement, by public bodies from non-governmental sources,
- Allow public bodies to establish small purchase procedures for goods and services, including microcomputers and related peripheral equipment, amounting to less than \$50,000 from non-governmental sources (\$30,000 for professional services).

NOTE #1: Community Services Boards are considered to be public bodies unless they operate as departments of local government. In that instance, the local government of which are a part is the public body.

Note #2: Non-profit organizations are private providers and, with the exception of Sheltered Workshops (See Sub-Section 10.700), have no preferential treatment under the VPPA; i.e., they are not exempt from competition.

Subject 5.430 - Intent

The intent of the General Assembly, as expressed in the VPPA is that all public bodies:

- Obtain high quality goods and services at reasonable cost,
- Conduct all procurement procedures in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety,
- Provide all qualified vendors access to public business and neither arbitrarily nor capriciously exclude any offeror,
- Seek competition to the maximum feasible degree,
- Enjoy broad flexibility in fashioning details of such competition,
- Provide clear rules, in advance of the competition, governing contract awards,
- Draw specifications that reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor and
- Freely exchange information between purchaser and vendor concerning what is sought to be procured and what is offered.

Subject 5.440 - Implementation

The following CSBs must implement the provisions of this Manual by establishing procurement rules and regulations that adhere to the policies and procedures contained in this Manual and comply with the VPPA:

- Operating CSBs.
- Administrative Policy CSB that are not local government departments or are not required to adhere to local government procurement policies and procedures.
- Behavioral Health Authorities.

Code of Virginia, Sections 2.2-4302 and 2.2-4303

NOTE: An unofficial copy of the Virginia Public Procurement Act is available on the Virginia Department of General Services web site. This can be accessed at: <http://dps.dgs.virginia.gov/dps/Manuals/manuals-bottom.htm>. Click on "VPPA".

The policies and procedures contained in this Manual should:

- Allow adequate flexibility to obtain goods and services which meet the needs of the CSB,
- Be consistent with the applicable procurement rules and regulations under which State Agencies in Virginia operate and,
- Prove to be acceptable to all auditing and regulatory bodies in Virginia.

Sub-Section 5.500 - What are the basic procurement procedures?

The basic decisions that must be made in the procurement process are as follows:

	DETERMINE A NEED	
	DETERMINE THE FOLLOWING:	
YES: FOLLOW EMERGENCY PURCHASE PROCEDURE	IS THE NEED AN EMERGENCY?	
	NO	
	IS COMPETITION REQUIRED?	NO: FOLLOW NON- COMPETITIVE PROCEDURES
	YES	
	IS COMPETITION AVAILABLE?	NO: FOLLOW SOLE SOURCE PROCEDURES
	YES	
YES: USE COMPETITIVE BIDDING (IFB)	IS IT POSSIBLE TO PREPARE DETAILED SPECIFICATIONS OR A SCOPE OF WORK?	NO: USE COMPETITIVE NEGOTIATION (RFP)

Sub-Section 5.600 - General Procurement Policies

What general procurement policies should apply to every procurement operation?

Subject 5.610 - Bulletin Board

A Bulletin Board, located in a public area (or in a place where vendors normally visit), must be maintained for the public posting of procurement notices and solicitations. The following actions are posted on the bulletin board:

- Requests for Proposals (RFPs) - RFPs must also be advertised in a newspaper of general circulation.
- Invitations for Bids (IFB),
- Sole source determinations and
- Emergency determinations.

If the CSB maintains an internet web site, that web site should contain a page on which the above information is also posted.

Requirement (VPPA)

The VPPA requires posting of the above-noted procurement actions when the anticipated dollar value is \$50,000 or more.

Requirement (DMHMRSAS)

Notices of all purchase actions (including award notices) expected to cost \$15,000 or more must be posted. This is consistent with best procurement practices as established by the

Virginia Department of General Services/Division
of Purchases and Supply.

Code of Virginia, Sections 11-37 and 11-41
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Subject 5.620 - Documentation

Each procurement transaction over \$5,000 must be supported by documentation which explains:

- Why? What is the purpose and justification?
- Who? Who will this be delivered to, who will benefit, monitor and resolve problems?
- What? Specifically, what is to be purchased?
- When? When is it needed?
- Where? Where must service be performed or goods delivered?
- How? How will compliance be measured? What standards will be used?

Examples of Documentation: Notes for the record, oral quotation tabulation, justification for using competitive negotiation, emergency justification, documentation of delivery failure.

Subject 5.630 - Freedom of Information

Public procurement is conducted in an environment similar to a lighted goldfish bowl. Procurement records are subject to the Freedom of Information laws:

- Most records, including proceedings, records, contracts, and bid records are open to inspection by any citizen or interested person, firm or corporation.
- Records pertaining to bids or proposals are not required to be made public until after the award except that bidders or offerors must be

afforded the opportunity to inspect the bid or proposal records after the evaluation process has been completed.

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EXCEPTION: Trade secrets or proprietary information submitted for a procurement transaction shall not be subject to public disclosure under the *Virginia Freedom of Information Act*; however, the bidder or offeror must invoke the protection of the *Code of Virginia*, Section 2.2-4342F, in writing, prior to or upon submission of the data or other materials, and must identify the data or other materials to be protected and state the reasons why protection is necessary. The classification of an entire bid or proposal document, line item prices and/or total bid or proposal pricing as proprietary or trade secrets is not acceptable. If after being given reasonable time, the bidder or offeror refuses to withdraw an entire classification designation, the bid should be considered non-responsive or the proposal should be rejected.

Code of Virginia, Section 2.2-4342

Subject 5.640 - Procurement Planning

Proper planning is essential in providing:

- What is needed (including the proper level of quality),
- In the right place,
- At the right time, and
- At the lowest possible cost.

Planning should begin as early as possible and involve the person who will handle the procurement process. The amount of time needed will depend upon the answers to questions such as:

- Which procurement method must be used?

- Do detailed specifications or a complex scope of work need to be developed?
- Is the item to be purchased readily available or must it be constructed?

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Lead time for a procurement program includes:

- Administrative Lead Time - This is the time which elapses between the initiation of the requirement and the contract award and, depending upon the complexity of the procurement, can range from a few days to a couple of months. It includes:
 - ◇ Internal review and approval (Administrative and Fiscal),
 - ◇ Specification development,
 - ◇ Advertising time (the time between the posting of the RFP or IFB and the opening date),
 - * Location of possible providers.
 - * The minimum time for a formal sealed bid or proposal is ten (10) days.
 - * In most instances, particularly if the solicitations are mailed, the time should be longer than ten (10) days.
 - ◇ Conducting pre-bid or pre-proposal conferences, if necessary, and issuing any resulting addenda,
 - ◇ Evaluation of bids or proposals and checking vendor references,
 - ◇ Negotiating with offerors who respond to an RFP,
 - ◇ Posting of the award, and
 - ◇ Award of the contract, including any necessary approvals.

- Delivery Lead Time - This is the time required by the chosen contractor to make shipment or perform the required work. This time varies widely depending upon many factors including the following:

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- ◇ Complexity of the work.
- ◇ Whether the goods procured are routine shelf items or custom made.
- ◇ Seasonal variations (Cost and availability on some products and services may vary from season to season).
- ◇ Industry fluctuations (including plant closings, recessions and overstock or understock conditions).
- ◇ Delivery or start-up time.

Subject 5.650 - Cooperative Procurement

The CSBs are encouraged to cooperate with other governmental procurement entities (cities, counties, state agencies, other CSBs) to consolidate the needs of several governmental entities for particular items or services into one procurement solicitation. In this situation, one procurement entity issues the solicitation and makes the award and the other participating entities purchase directly from the successful contractor. Advantages of cooperative procurement are:

- Lower prices often result from larger total quantity.
- Decreased administrative costs for the procurement entity that does not have to issue a solicitation.
- If several cooperative procurements are made, the responsibility for issuing the solicitation and awarding the contract may be rotated among the participating entities in order to spread out the administrative effort.

The Office of Administrative Services/Procurement Office of the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services is available to assist CSBs with cooperative contracts.

Code of Virginia, Section 2.2-4304

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Subject 5.660 - Price Reasonableness

When: A price reasonableness determination should be made for procurements which exceed the single quotation limit when:

- Only one quotation is received.
- Competition is not adequate to determine if prices received are fair and reasonable.
- Prices received appear to be excessive.
- When considering change orders or contract extensions.

A price reasonableness determination should also be made for procurements where competition is not required but where there is doubt or lack of knowledge regarding whether or not a price is reasonable.

How: A price reasonableness determination can be made by taking one or more of the following actions:

- Compare prices previously paid for the same type of goods or service considering economic trends and quantities purchased.
- Contact other buyers (city, county, state, or other CSBs) of the same type of goods or service.

- Compare prices received with list or catalog prices less the amount of discount the CSB would expect to receive.

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Remedy: If the prices quoted are found to be excessive:

If the procurement is...	Then...
Informal Bidding	Solicit additional quotes.
Sealed Bids (IFB)	Consider rebidding with revised specifications and/or additional bidders.
Competitive Negotiation (RFP)	Continue negotiations to secure lower pricing.
Professional Services	Consider resolicitation with revised scope of work and/or additional offerors.

Document: The results of the price determination efforts should be included in the procurement file.

Subject 5.670 - Procurement Procedures

Each CSB, if it is not subject to the procurement regulations of a local government, must have written procurement procedures that have been approved by the Board of Directors or appropriate local government authority and meet the requirements of this Manual.

In addition, each CSB should publish and distribute those procedures that affect vendors, providers or contractors in the form of a "Vendors' Guide to Procurement Procedures". This Guide will provide information regarding:

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- The general rules and requirements and procedures governing procurements made by the CSB.
- How vendors (providers) may market and sell their goods and services to the CSB.
- Methods for resolving disputes regarding procurements.

A model "Vendor's Guide to Procurement Procedures" is included in Appendix B. This Guide may be revised, adapted to meet the needs of each CSB and published as a separate document. It should be made available to vendors and other providers of goods and services to the CSB.

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Sub-Section 5.700 - Professional Development

The proper conduct of the procurement function requires a thorough knowledge of the laws pertaining to procurement as well as the proper methods and procedures for a multitude of actions. It is essential, in today's complex environment, that persons with procurement authority are properly trained. Training is available from:

- Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS).
- Department of General Services/Division of Purchases and Supply (DGS/DPS).
- Virginia Association of Governmental Purchasing (VAGP),
- National Institute of Governmental Purchasing, Inc. (NIGP) and its local chapters.
- Institute for Supply Management (ISM) and its local chapters. (This is the successor organization to the National Association of Purchasing Management.)

Several certification programs are available which recognize knowledge and proficiency achieved in the field of procurement. These include:

- Certified Public Purchasing Officer (CPPO) - NIGP

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- Certified Professional Public Buyer (CPPB) - NIGP
- Certified Purchasing Manager (CPM) - ISM
- Virginia Contracting Officer (VCO) – DGS/DPS

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Sub-Section 5.800 - What is a Contract?

Subject 5.810 - Definition of a Contract

A contract is...	Explanation
An agreement (offer and acceptance).	Offer from a vendor. EXAMPLE: Bid or Proposal. Accepted by the buyer. EXAMPLE: Purchase Order or Contract.
Enforceable by law.	Either party to a contract may seek assistance through the judicial system to enforce provisions of the contract.
Between two or more competent parties.	Agreement must be reached between parties who have the legal capacity to contract.
To do or not to do something.	A contract can provide for the sale or barter of goods or services. It can also be an agreement not to perform some action. EXAMPLE: Party "A" will not begin a separate support program if Party "B" expands theirs.

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A contract is...	Explanation
Not prohibited by law.	EXAMPLES: No illegal drugs. No provision of tobacco products to juveniles.
For consideration.	Exchange of something of value.

Subject 5.820 - Elements of a Contract

NOTE: *While most text books include all of the elements stated herein, they are often called by different names or grouped under different headings. This section is written to correspond with the contract elements as taught in the NIGP procurement classes while also including the terms found in other texts. There is not a uniformity of opinion among legal experts regarding what needs to be in a contract; therefore, the use of standard solicitations and contract documents that have been approved as to form by the attorney for the CSB is recommended.*

To be enforceable, a contract must contain the following elements:

- **Offer** - There must be a valid offer to contract. An offer can take many forms including response to a bid and an advertisement to sell. An offer is an expression of:
 - > What the offeror promises to do and
 - > What the offeror demands in return.

EXAMPLE: In public procurement, the procurement office issues a solicitation (Invitation for Bids or Request for Proposals) to potential contractors to make an offer. The response from the bidder or offeror in the form of a bid or proposal becomes the offer

and contains the description of what the offeror promises to do and what is demanded in return.

- **Acceptance** - An acceptance (consent) is a communication to the offeror, from the authorized official of the offeree (buyer), of the intention to accept the offer.

NOTE: In public procurement, the acceptance is usually communicated by a purchase order or other contract acceptance document which specifically refers to the offeror's bid or proposal. Therefore, the offeror's bid or proposal and the buyer's purchase order constitute the contract.

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TWO PARTY CONTRACT DOCUMENT: A contract form, requiring both parties to sign the same document, may be used. This document should make specific reference to the offeror's bid or proposal. If there are any differences in the provisions of the two party contract document and the original proposal, the two party contract document will take precedence.

- **Consideration** - Generally, a contract must be supported by consideration; i.e., something must be exchanged for something else. Both parties must give up something. That "something" could be:
 - > Money exchanged for goods or services,
 - > Promise of future services exchanged for other services, or
 - > Promise of future services exchanged for agreement not to take some action.
- **Legal Purpose** (Legality of the Object) - The objective of the contract must be legal. The contract must meet the requirements of contract law and not involve the commission of illegal activities.

EXAMPLE: A contract to purchase drugs illegally would not be a binding contract.

NONEXAMPLE: A licensed pharmacist purchasing legal drugs.

- **Competent Parties** (also called Capacity of the Parties - Both parties must be competent to make a valid contract; i.e., they must be competent. Parties who may have either limited or no capacity to contract include:

- > Persons who have not attained the age of majority (18 years in Virginia).
- > Persons adjudicated to be incompetent.
- > Persons under the influence of alcohol or drugs.
- > Persons who have been convicted of a felony (under certain circumstances).

A contract, in which one party does not have legal capacity, may be either void or voidable. If voidable, the party without legal capacity may elect not to perform or may disaffirm (repudiate) the contract.

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- **Mutuality of Obligation** - Both parties have an obligation to perform and the contract must be enforceable.

EXAMPLE:

The seller must deliver the goods or services at:

- > The right time.
- > The right place.
- > The right price.
- > The right quantity.
- > The right quality (meeting the specifications).

The buyer must pay for the goods or services at the agreed upon price.

NOTE:

The "Default" clause (see clause Q in Appendix E of this manual) allows the buyer to purchase from other sources and charge the difference in price to the seller in the event that the seller defaults.

- **Definiteness** - The terms of a contract should be definite and have an exact meaning. The degree of definiteness could affect the validity of the contract.

EXAMPLE: A contract for child care services may not be enforceable if it does not include specifics such as

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times of service, food service, educational requirements, etc.

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Subject 5.825 - Form of a Contract

Written vs. Unwritten

Many unwritten contracts are legal; however, they are often difficult to enforce. Contracts for the purchase of goods in excess of \$500 should always be in writing since, under the provisions of the Virginia Statute of Frauds, these contracts, if not in writing, are (with some exceptions) unenforceable.

Code of Virginia, Section 8.2-201

Subject 5.830 - Types of Contracts

Length of Time: Contracts may be classified as:

- (1) One time procurement (spot purchase) to procure a particular item of goods or a specific service.

Example #1: Purchase of a piece of furniture.

Example #2: Purchase of the services of a painting contractor to provide labor and materials to paint a specific number of rooms at a set price.

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(2) Term (period of time). Term contracts cover:

(a) Definite requirements.

Example: Perform a study over a period of several months for a set amount of money but with periodic payments made over the life of the contract.

(b) Requirements contracts include:

- Fixed price per-unit.
- Quantity that cannot be definitely determined in advance.
- Quantity may be adjusted to meet actual requirements.

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Example: The services of a therapist based upon a fixed rate per hour with the number of hours to be determined by the needs of the clients.

Determination of Payment: Contracts are also classified on the basis of how the amount of payment is determined. These include:

- Fee or Price Based
- Cost Based

There are several variations of the above-stated classifications. These include:

- Variable Rate
- Blended Rate
- Time and Materials

These are further defined as follows:

Fixed or Fee Based • Fixed Price - A contract which provides for a firm price for the duration of the contract. No price increases are allowed. As with other contracts, a fixed price contract may be renewed for an additional term(s) if the contract includes

a renewal clause. Price changes are not usually made unless the purchaser adds to the scope of work or a condition arises which was unforeseen.

Example: A contractor bids \$100.00 to remove a wall and in the process finds concealed asbestos which could not have been anticipated.

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Fee or Price
Based
(Continued)

- Fixed Price with Escalation/De-escalation - A contract which provides for a firm price but also allows increases or decreases in that price for inflation and/or other contingencies. Such contracts contain an escalation/de-escalation clause such as #55 of Section II, Appendix E of this Manual.
- Fixed Fee Plus (or Minus) Incentive - A contract for fixed price but containing a clause in the IFB or RFP permitting the successful contractor to:
 - Suggest cost-saving changes to the specifications or scope of work.
 - Share in the cost savings.

Example: A particular contract may contain an incentive clause which allows a split (e.g. 50/50) of cost savings suggestions during the first year.

- The contractor may suggest an alternate way of fully meeting the requirements of a contract which results in a reduction of \$10,000.
- If this change is accepted by the buyer, the cost of the contract would be reduced by \$5,000.
- The contractor would add the remaining

\$5,000 to his/her profit for the first year.

- The buyer would realize the entire \$10,000 savings during the second and succeeding years of the contract.
- By incorporating these changes into the specifications or scope of work, the changes would continue to produce savings in future solicitations.

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Cost Based

- Cost-Plus-A-Fixed-Fee - A contract which includes:
 - Reimbursement for actual expenses PLUS
 - A firm contract fee.
- Cost-Plus Incentive Fee - A contract which includes:
 - Reimbursement for actual expenses PLUS
 - A contract fee which increases in direct proportion to the savings effected by the contractor.
- Cost-Plus-A-Percentage-Of-Cost (Illegal: See note) - A contract which includes:
 - Reimbursement for actual expenses PLUS
 - A contract fee in the form of a percentage of the cost.

Therefore, the amount of this fee increases in direct proportion to the actual expenses (cost). A contractor has no incentive to control costs under this type of contract.

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NOTE: Except in case of emergency affecting public health, safety or welfare and for some insurance contracts, public bodies (CSBs) are not permitted to use this type of contract.

Code of Virginia, Section 2.2-4331

Variable Rate Variable rate contracts - Contractor fee changes during the period of the contract based upon factors such as the:

- season of the year.
- volume of usage or quantity purchased.

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Blended Rate Blended rate contracts - Contractor's fee is a single rate (per hour, per job, etc.) for work performed by several classifications of personnel; however, this rate is the result of (or average of) the fees of all of the personnel involved.

Example: A contract for consumer services might include the services of a psychologist whose fee is \$100.00 per hour and a occupational therapist whose fee is \$70.00; however, there may be one contract rate of \$78.00 per hour regardless of type of services that are required.

**Rate
Determi-
nation:**

The rate is usually determined through an analysis of the percent of each type of service that is expected to be needed over the contract period.

Benefit: Invoice certification and processing is easier.

Disad-

vantage: The percentage used may not prove to be valid and the rate actually paid may be too high.

**Time and
Materials**

Time and materials contracts include:

- Reimbursement for cost of materials, equipment and/or supplies or materials may be charged at list less a percent discount.
 - An hourly fee based upon the actual number of direct labor hours.
-